Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan	)	CC Docket No. 97-137

MEMORANDUM OPINION AND ORDER

Adopted: August 19, 1997 **Released: August 19, 1997**

By the Commission: Chairman Hundt and Commissioners Quello, Ness, and Chong issuing separate statements.

TABLE OF CONTENTS

I. INTRODUCTION

1. On May 21, 1997, Ameritech Michigan (Ameritech)[1] filed an application for authorization under section 271 of the Communications Act of 1934, as amended,[2] to provide in-region, interLATA services in the State of Michigan.[3] For the reasons set forth below, we deny Ameritech's application.

2. Before summarizing our conclusions, we wish to acknowledge the efforts to date of the State of Michigan and Ameritech in opening that state's local exchange markets to competition. The State of Michigan has been at the forefront of state efforts to foster the

[1] Ameritech Michigan is the Bell operating company that provides local exchange service in Michigan. Ameritech Michigan is a wholly-owned subsidiary of Ameritech Corporation. For the purposes of this Order, we will refer to Ameritech Michigan as "Ameritech," and to its parent company as "Ameritech Corporation."

[2] 47 U.S.C. § 271. Section 271 was added by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), *codified at* 47 U.S.C. §§ 151 *et seq.* We will refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act."

[3] Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Service in Michigan, CC Docket No. 97-137 (filed May 21, 1997) (Ameritech Application). Unless an affidavit appendix reference is included, all cites to the "Ameritech Application" refer to Ameritech's "Brief in Support of Application." *See Comments Requested on Application by Ameritech Michigan for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Michigan*, Public Notice, DA 97-1072 (rel. May 21, 1997) (*May 21st Public Notice*). A list of parties that submitted comments or replies is set forth in the Appendix.

emergence of effectively competitive local exchange markets.[4] In 1991, the Michigan Legislature passed legislation designed to remove barriers to local competition, five years before Congress's 1996 overhaul of the federal telecommunications act. Ameritech, too, long has been among the leaders in its segment of the telecommunications industry working toward opening local markets to competition. Ameritech's Customer First Plan, for example, announced in March 1993, constituted a major advance in telecommunications policy by proposing a framework to eliminate legal, economic and technical barriers to local competition.[5]

3. Since then, as the Department of Justice noted in its assessment, Ameritech "has made significant and important progress toward meeting the preconditions for in-region interLATA entry."[6] The Department of Justice, with which Ameritech has worked closely, has also noted Ameritech's cooperation, particularly with respect to the development of processes for nondiscriminatory access to Ameritech's operations support systems.[7] Such access is critically important to the development of effective, sustained competition in the local exchange market.

4. That we ultimately conclude, as did the Michigan Public Service Commission (Michigan Commission) and the Department of Justice, that Ameritech's May 21, 1997 application to provide in-region interLATA service in Michigan does not demonstrate compliance with all of section 271's requirements, as we explain herein, does not diminish the efforts Ameritech has made thus far. Rather, our decision here recognizes the complexity of opening historically monopolized local markets to competition, and the clear mandate of Congress that such markets must be open to competition before the Bell Operating Companies (BOCs) are to be permitted to provide in-region, interLATA services.

5. In this Order, we find that Ameritech has met its burden of demonstrating that it is providing access and interconnection to an unaffiliated, facilities-based provider of telephone exchange service to residential and business subscribers in Michigan, as required by section 271(c)(1)(A) of the statute. We further conclude, however, that Ameritech has not yet demonstrated that it has fully implemented the competitive checklist in section 271(c)(2)(B). In particular, we find that Ameritech has not met its burden of showing that it meets the competitive checklist with respect to: (1) access to its operations support systems; (2)

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[4] *See* Evaluation of the United States Department of Justice, CC Docket No. 97-137 at 2 (filed June 25, 1997) (Department of Justice Evaluation). The Department of Justice notes that, "[i]n some urban areas of the state, new entrants have made notable progress . . ." *Id.*

[5] *See* Ameritech Application at 4.

[6] Department of Justice Evaluation at iv.

[7] *See, e.g., id.* at 2.

interconnection; and (3) access to its 911 and E911 services. We do not decide whether Ameritech has met its burden of demonstrating compliance with the remaining items on the competitive checklist. In addition, we find that Ameritech has not demonstrated that its "requested [in-region, interLATA authorization] will be carried out in accordance" with the structural and transactional requirements of sections 272(b)(3) and 272(b)(5), respectively.[8]

6. In light of our conclusions that Ameritech has not demonstrated that it satisfies the competitive checklist or that it would carry out the requested authorization in accordance with section 272, we deny, pursuant to section 271(d)(3), Ameritech's application to provide in-region, interLATA services in Michigan. Thus, we need not, and do not, address the issue of whether Ameritech has demonstrated that the authorization it seeks is consistent with the public interest, convenience, and necessity. Accordingly, we do not base the denial of Ameritech's application on a public interest determination. Nevertheless, in order to give Ameritech and other interested parties guidance concerning the public interest standard that we will apply in evaluating future section 271 applications, we set forth our views on the meaning and scope of certain aspects of the public interest inquiry mandated by Congress.

II. BACKGROUND

A. Statutory Framework

7. The 1996 Act conditions BOC entry into the provision of in-region interLATA services on compliance with certain provisions of section 271.[9] BOCs must apply to the Federal Communications Commission (Commission) for authorization to provide interLATA services originating in any in-region state.[10] The Commission must issue a written

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[8] *See* 47 U.S.C. § 271(d)(3)(B).

[9] For purposes of this proceeding, we adopt the definition of the term "Bell Operating Company" contained in 47 U.S.C. § 153(4).

[10] 47 U.S.C. § 271(d)(1). For purposes of this proceeding, we adopt the definition of the term "in-region state" that is contained in 47 U.S.C. § 271(i)(1). We note that section 271(j) provides that a BOC's in-region services include 800 service, private line service, or their equivalents that terminate in an in-region state of that BOC and that allow the called party to determine the interLATA carrier, even if such services originate out-of-region. *Id.* § 271(j). The 1996 Act defines "interLATA services" as "telecommunications between a point located in a local access and transport area and a point located outside such area." *Id.* § 153(21). Under the 1996 Act, a "local access and transport area" (LATA) is "a contiguous geographic area (A) established before the date of enactment of the [1996 Act] by a [BOC] such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or (B) established or modified by a [BOC] after such date of enactment and approved by the Commission." *Id.* § 153(25). LATAs were created as part of the Modification of Final Judgement's (MFJ's) "plan of reorganization." *United States v. Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C. 1983), *aff'd sub nom. California v. United States*, 464 U.S. 1013 (1983). Pursuant to the MFJ, "all [BOC] territory in the continental United States [was] divided into LATAs, generally centering upon a city or other

determination on each application no later than 90 days after receiving such application.[11] In acting on a BOC's application for authority to provide in-region interLATA services, the Commission must consult with the Attorney General and give substantial weight to the Attorney General's evaluation of the BOC's application.[12] In addition, the Commission must consult with the applicable state commission to verify that the BOC has one or more state-approved interconnection agreements with a facilities-based competitor, as required in section 271(c)(1)(A), or a statement of generally available terms and conditions, as required in section 271(c)(1)(B), and that either the agreement(s) or general statement satisfy the "competitive checklist," as described below.[13]

8. Section 271 requires the Commission to make various findings before approving BOC entry. A BOC must show that it satisfies the requirements of either section 271(c)(1)(A), known as Track A, or 271(c)(1)(B), known as Track B.[14] Section 271(c)(1)(A), which is the pertinent section for purposes of this Order, states that a BOC must provide access and interconnection to one or more unaffiliated competing providers of telephone exchange service to residential and business subscribers. The section further specifies that the competing carrier's telephone exchange service may be offered either exclusively over its own telephone exchange service facilities or predominantly over its own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.

9. In order to obtain authorization under section 271(c)(1)(A), the BOC must also show that: (1) it has "fully implemented the competitive checklist" contained in section 271(c)(2)(B);[15] (2) the requested authorization will be carried out in accordance with the

identifiable community of interest." *United States v. Western Elec. Co.*, 569 F. Supp. 990, 993-94 (D.D.C. 1983).

[11] 47 U.S.C. § 271(d)(3).

[12] *Id.* § 271(d)(2)(A).

[13] *Id.* § 271(d)(2)(B).

[14] *Id.* § 271(d)(3)(A).

[15] *Id.* §§ 271(c)(2)(B), 271(d)(3)(A)(i).

requirements of section 272;[16] and (3) the BOC's entry into the in-region interLATA market is "consistent with the public interest, convenience, and necessity."[17]

B. The Purpose of Section 271

10. The 1996 Act's overriding goal is to open all telecommunications markets to competition and, ultimately, to deregulate these markets.[18] Before the 1996 Act's passage, major segments of the telecommunications industry were precluded, by law and economics, from entering each others' markets. The BOCs, the local progeny of the once-integrated Bell system, were barred by the terms of the MFJ from entering certain lines of business, including long distance services.[19] The ban on BOC provision of long distance services was based on the MFJ court's determination that such a restriction was "clearly necessary to preserve free competition in the interexchange market."[20] The court found that, if the BOCs were permitted to compete in the interexchange market, they would have "substantial incentives" and opportunity, through their control of local exchange and exchange access facilities and

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[16] *Id.* § 272. *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), *recon.*, Order on Reconsideration, 12 FCC Rcd 2297 (1997), *review pending sub nom., SBC Communications v. FCC*, No. 97-1118 (D.C. Cir., filed Mar. 6, 1997) (held in abeyance pursuant to court order filed May 7, 1997), *remanded in part sub nom., Bell Atlantic Telephone Companies v. FCC*, No. 97-1067 (D.C. Cir., filed Mar. 31, 1997), *on remand*, Second Order on Reconsideration, FCC 97-222 (rel. June 24, 1997), *petition for review pending sub nom. Bell Atlantic Telephone Companies v. FCC*, No. 97-1423 (D.C. Cir. filed July 11, 1997); *Implementation of the Telecommunications Act of 1996; Accounting Safeguards Under the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 17539 (1996), *recon. pending.*

[17] 47 U.S.C. § 271(d)(3)(C).

[18] The purpose of the 1996 Act is to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans *by opening all telecommunications markets to competition.*" Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement) (emphasis added).

[19] The MFJ contained the terms of the settlement of the Department of Justice's antitrust suit against AT&T. *See United States v. Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983). Specifically, the MFJ prohibited BOCs from providing interLATA services. The MFJ did not bar BOCs from providing intraLATA toll services.

[20] *Id.* at 188.

services, to discriminate against their interexchange rivals and to cross-subsidize their interexchange ventures.[21]

11. For many years, the provision of local exchange service was even more effectively cordoned off from competition than the long distance market. Regulators viewed local telecommunications markets as natural monopolies, and local telephone companies, the BOCs and other incumbent local exchange carriers (LECs), often held exclusive franchises to serve their territories. Moreover, even where competitors legally could enter local telecommunications markets, economic and operational barriers to entry effectively precluded such forays to any substantial degree. Lifting statutory and regulatory barriers to local competition was thus a necessary prerequisite to local competition, but not enough to bring competition to the local market. Equally important to the goal of competition was the elimination of economic and operational barriers to entry.

12. These economic and operational barriers largely are the result of the historical development of local exchange markets and the economics of local telephone networks. An incumbent LEC's ubiquitous network, financed over the years by the returns on investment under rate-of-return regulation, enables an incumbent LEC to serve new customers at a much lower incremental cost than a facilities-based entrant that must install its own network components.[22] Additionally, the value of a telephone network increases with the number of subscribers on the network. Congress recognized that duplicating the incumbents' local networks on a ubiquitous scale would be enormously expensive.[23] It also recognized that no competitor could provide a viable, broad-based local telecommunications service without interconnecting with the incumbent LEC in order to complete calls to subscribers served by the incumbent LECs' network.

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[21] *Id.* Although never called upon to make final evidentiary conclusions, the court found it appropriate "to consider whether the state of proof at trial was such as to sustain th[e] divestiture as being in the public interest." *Id.* at 161.

[22] An incumbent LEC has a lower incremental cost of serving any group of customers because of the economies of scope that come from serving all other LEC customers (*i.e.*, because of the incumbent LEC's ubiquitous network). A new entrant has a higher incremental cost of serving the same group of customers with the facilities it constructs because it serves fewer customers overall and cannot achieve the same economies of scope. This is the rationale behind the Total Element Long-Run Incremental Cost (TELRIC) pricing methodology. TELRIC pricing for unbundled network elements enables the new entrant to serve its customers at the incumbent LEC's incremental costs and avoids inefficient duplication of the incumbent LEC's network. We discuss TELRIC pricing principles *infra* at Section VI.F.1.

[23] Joint Explanatory Statement at 148 ("This conference agreement recognizes that it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant").

13. Against this backdrop Congress enacted the sweeping reforms contained in the 1996 Act, the first comprehensive reform of the federal telecommunications statute in over sixty years. Congress, primarily through sections 251, 252 and 253 of the Act, sought to open local telecommunications markets to previously precluded competitors not only by removing legislative and regulatory impediments to competition, but also by reducing inherent economic and operational advantages possessed by incumbents. The provisions of the Act require incumbent LECs, including BOCs, to share their networks in a manner that enables competitors to choose among three methods of entry into local telecommunications markets, including those methods that do not require a new entrant, as an initial matter, to duplicate the incumbents' networks. Pursuant to the Act, the BOCs must offer at cost-based rates nondiscriminatory interconnection with their networks and access to unbundled elements of their networks for use by competitors. The Act also requires BOCs to make their retail services available at wholesale rates so that they can be resold by new entrants.

14. A salient feature of these market-opening provisions is that a competitor's success in capturing local market share from the BOCs is dependent, to a significant degree, upon the BOCs' cooperation in the nondiscriminatory provisioning of interconnection, unbundled network elements and resold services pursuant to the pricing standards established in the statute. Because the BOCs, however, have little, if any, incentive to assist new entrants in their efforts to secure a share of the BOCs' markets, the Communications Act contains various measures to provide this incentive, including section 271. Through this statutory provision, Congress required BOCs to demonstrate that they have opened their local telecommunications markets to competition *before* they are authorized to provide in-region long distance services.[24] Section 271 thus creates a critically important incentive for BOCs to cooperate in introducing competition in their historically monopolized local telecommunications markets.[25]

15. By requiring BOCs to demonstrate that they have opened their local markets to competition before they are authorized to enter into the in-region long distance market, the 1996 Act enhances competition in both the local and long distance markets. We believe that entry into the long distance market by BOCs that have opened their local markets would

[24] The Act permitted BOCs to begin providing long distance service originating outside of their regions upon the Act's enactment. 47 U.S.C. § 271(b)(2).

[25] Ameritech's Chief Executive Officer, Richard Notebaert, has recognized the power of this incentive. In commenting on the difference between Ameritech and GTE, which is not subject to the section 271 requirements, Mr. Notebaert is quoted as stating: "The big difference between us and them is they're already in long distance - What's their incentive to cooperate?" Mike Mills, *Holding the Line on Phone Rivalry; GTE Keeps Potential Competitors, Regulators' Price Guidelines at Bay*, Wash. Post, Oct. 23, 1996, at C12.

further competition in the long distance market and benefit consumers.[26] Indeed, given the BOCs' strong brand recognition and other significant advantages from incumbency, advantages that will particularly redound in the broad-based provision of bundled local and long distance services, we expect that the BOCs will be formidable competitors in the long distance market and, in particular, in the market for bundled local and long distance services. The recent successes of Southern New England Telecommunications Corporation (SNET) and GTE in attracting customers for their long distance services illustrates the ability of local carriers to garner a significant share of the long distance market rapidly.[27] Further, recent studies have predicted that AT&T's share of the long distance market may fall to 30 percent with BOC entry.[28] Such additional competition in the long distance market is precisely what the 1996 Act contemplates and is welcomed.

16. In this regard, the development of a substantially competitive market for interstate interexchange services has enabled us to seek to reduce regulation in this area by eliminating tariffs for non-dominant interexchange carriers.[29] We remain concerned, however, that not all segments of this market appear to be subject to vigorous competition.[30] For example, we remain concerned about the relative lack of competition among carriers to serve

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[26] In its evaluation of the application by SBC to provide in-region interLATA services in Oklahoma, the Department of Justice noted: "InterLATA markets remain highly concentrated and imperfectly competitive . . . and it is reasonable to conclude that additional entry, particularly by firms with the competitive assets of the BOCs, is likely to provide additional competitive benefits." Evaluation of the United States Department of Justice Evaluation, CC Docket No. 97-121 at 3-4 (filed May 16, 1997) (Department of Justice SBC Oklahoma Evaluation).

[27] Merrill Lynch has reported that SNET's long distance affiliate captured 35% of SNET's local customers within two years of entry. Merrill Lynch, *Telecom Services -- RBOCs and GTE. Fourth Quarter Review: Defying the Bears Once Again, Reporting Robust EPS Growth; Regulatory Cloud Beginning to Lift,* at 8 (Feb. 19, 1997)). It has been reported that GTE converted one million of its local customers into GTE long distance customers and is signing up customers at the rate of 6,000 a day. *Companies Release Financials*, Comm. Today, Apr. 16, 1997; John J. Keller, *Telecommunications: BT-MCI Merger Reshapes Telecom Industry,* Wall St. J., Nov. 5, 1996, at B1.

[28] *See Strong RHC Brand Identity, Sharp Drop in AT&T's Market Share Predicted*, Comm. Daily, July 9, 1997. Currently, AT&T's share of the long distance market is 51% as measured by revenue and 54% as measured by switched access minutes. *Long Distance Market Shares*, Federal Communication Commission, Common Carrier Bureau, Industry Analysis Division, Report, July 18, 1997.

[29] *Policy and Rules Concerning the Interstate, Interexchange Marketplace;Implementation of Section 254(g) of the Communications Act of 1934, as amended,* CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (1996) (*Interexchange Second Report and Order), recon. pending.* The *Interexchange Second Report and Order* was stayed by the United States Court of Appeals for the District of Columbia Circuit in *MCI Telecommunications Corp. v. FCC,* No. 96-1459 (D.C. Cir. Feb. 13, 1997).

[30] *See Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier,* 11 FCC Rcd 3271, 3313-3314 (1995) (*AT&T Reclassification Order*).

low volume long distance customers.[31] We expect that BOCs entering the long distance market will compete vigorously for all segments of the market, including low volume long distance customers. We note that, in determining the extent to which BOC entry into the long distance market would further competition, we would find it more persuasive if parties presented specific information as to how such entry will bring the benefits of competition, including lower prices, to *all* segments of the long distance market.

17. Significantly, however, the 1996 Act seeks not merely to enhance competition in the long distance market, but also to introduce competition to local telecommunications markets. Many of the new entrants, including the major interexchange carriers, and the BOCs, should they enter each other's territories, enjoy significant advantages that make them potentially formidable local exchange competitors.[32] Unlike BOC entry into long distance, however, the competing carriers' entry into the local market is handicapped by the unique circumstance that their success in competing for BOC customers depends upon the BOCs' cooperation. Moreover, BOCs will have access to a mature, vibrant market in the resale of long distance capacity that will facilitate their rapid entry into long distance and, consequently, their provision of bundled long distance and local service. Additionally, switching customers from one long distance company to another is now a time-tested, quick, efficient, and inexpensive process. New entrants into the local market, on the other hand, do not have available a ready, mature market for the resale of local services or for the purchase of unbundled network elements, and the processes for switching customers for local service from the incumbent to the new entrant are novel, complex and still largely untested. For these reasons, BOC entry into the long distance market is likely to be much easier than entry by potential BOC competitors into the local market, a factor that may work to a BOC's advantage in competing to provide bundled services.

18. If the local market is not open to competition, the incumbent will not face serious competitive pressure from new entrants, such as the major interexchange carriers. In other words, the situation would be largely unchanged from what prevailed before passage of

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[31] Earlier this year, AT&T committed in writing to flow through proportionately to its basic schedule customers the savings it would obtain in the access charge reform proceeding, and AT&T and MCI subsequently reduced their basic schedule rates for residential customers. These decreases represented the first general reduction in basic schedule residential interstate long distance rates since the early 1990s. *See* Letter from Gerald M. Lowrie, Senior Vice President, AT&T, to Reed E. Hundt, Chairman, Federal Communications Commission (May 3, 1997). *See generally Access Charge Reform*, CC Docket No. 96-262, First Report and Order, FCC 97-158 (rel. May 16, 1997) (*Access Charge Reform Order*). As we noted in the *AT&T Reclassification Order*, "since 1991, basic schedule rates for domestic residential service have risen approximately sixteen percent (in nominal terms), with much of the increase occurring since January 1, 1994." *AT&T Reclassification Order*, 11 FCC Rcd at 3313.

[32] AT&T's Chairman, Robert Allen, was reported to have predicted that AT&T would "take at least a third" of the $90 billion local telephone market within several years. John J. Keller, *AT&T Challenges the Bell Companies*, Wall St. J., June 12, 1996, at A3.

the 1996 Act. That is why we must ensure that, as required by the Act, a BOC has fully complied with the competitive checklist.[33] Through the competitive checklist and the other requirements of section 271, Congress has prescribed a mechanism by which the BOCs may enter the in-region long distance market. This mechanism replaces the structural approach that was contained in the MFJ by which BOCs were precluded from participating in that market. Although Congress replaced the MFJ's structural approach, Congress nonetheless acknowledged the principles underlying that approach -- that BOC entry into the long distance market would be anticompetitive unless the BOCs' market power in the local market was first demonstrably eroded by eliminating barriers to local competition. This is clear from the structure of the statute, which requires BOCs to prove that their markets are open to competition before they are authorized to provide in-region long distance services. We acknowledge that requiring businesses to take steps to share their market is an unusual, arguably unprecedented act by Congress. But similarly, it is a rare step for Congress to overrule a consent decree, especially one that has fostered major advances in technology, promoted competitive entry, and developed substantial capacity in the long distance market. Congress plainly intended this to be a serious step. In order to effectuate Congress' intent, we must make certain that the BOCs have taken real, significant, and irreversible steps to open their markets. We further note that Congress plainly realized that, in the absence of significant Commission rulemaking and enforcement, and incentives all directed at compelling incumbent LECs to share their economies of scale and scope with their rivals, it would be highly unlikely that competition would develop in local exchange and exchange access markets to any discernable degree.

19. Unless such competition emerges, one of the ultimate goals of the 1996 Act, telecommunications deregulation, cannot be realized, at least not without risking monopoly prices for consumers. It is often easy to lose sight of the fact that deregulation will affect not only federal regulation of the telecommunications industry, but state regulation as well. Indeed, because regulation of the prices that consumers pay for local telecommunications services is a matter of state control, Congress's goal of deregulation will be most strongly felt at the state level.

20. In addition to deregulation, the opening of all telecommunications markets to competition will have other profound benefits. Consumers will have the choice of obtaining all of their telecommunications services from a single provider, so-called one-stop shopping. Telecommunications providers will be able to bundle packages of services to meet specific customer demands. Additionally, as we have recently noted, competition in the local telecommunications markets may help remove implicit subsidies in access charges.[34] In the

[33] *See* 47 U.S.C. § 271(d)(3)(A) (requiring, *inter alia,* the Commission to determine that a BOC has "fully implemented" the competitive checklist).

[34] *Access Charge Reform Order*, FCC 97-158, at para. 7.

end, consumers will benefit greatly by the removal of market barriers allowing firms the opportunity for full and fair competition in both the local and long distance markets on the basis of price, quality of service, and technological innovation.

21. In order to obtain these benefits, we must apply the statutory conditions designed to ensure that local telecommunications markets are open to competition such that previously precluded competitors in local and in long distance markets may now become competitors in each market. It is essential for local competition that the various methods of entry into the local telecommunications market contemplated by the Act -- construction of new facilities, purchase of unbundled network elements, and resale -- be truly available. Therefore, an open local market is one in which, among other things, new entrants have nondiscriminatory access to interconnection, transport and termination, and unbundled network elements at prices based on forward-looking economic costs, and the opportunity to obtain retail services at an appropriate discount for resale.[35] New entrants cannot compete effectively if, for example, the price of unbundled network elements precludes efficient entry by not allowing new entrants to take advantage of the incumbent's economies of scale, scope and density. Moreover, we need to ensure that the ability of efficient new entrants to garner market share is not obstructed by a BOC's failure to provide these essential inputs. We would question whether a BOC's local telecommunications market is open to competition absent evidence that the BOC is fully cooperating with new entrants to efficiently switch over customers as soon as the new entrants win them. This entails, among other things, the ability of new entrants to obtain the same access to the BOCs' operations support systems that the BOCs or their affiliates enjoy.

22. Moreover, we need to ensure that the market opening initiatives of the BOCs continue after their entry into the long distance market. It is not enough that the BOC prove it is in compliance at the time of filing a section 271 application; it is essential that the BOC must also demonstrate that it can be relied upon to remain in compliance. This may be demonstrated in various ways. For example, we must be confident that the procedures and processes requiring BOC cooperation, such as interconnection and the provision of unbundled network elements, have been sufficiently available, tested, and monitored. Additionally, we will look to see if there are appropriate mechanisms, such as reporting requirements or performance standards, to measure compliance, or to detect noncompliance, by the BOCs with their obligations. Finally, the BOC may propose to comply continually with certain conditions, or we may, on a case-by-case basis, impose conditions on a BOC's entry to ensure continuing compliance. The section 271 approval process necessarily involves viewing a snapshot of an evolving process. We must be confident that the picture we see as of the date of filing contains all the necessary elements to sustain growing competitive entry into the future.

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[35] For a discussion of TELRIC pricing principles for checklist items, see *infra* Section VI.F.1.

23. The requirements of section 271 are neither punitive nor draconian. They reflect the historical development of the telecommunications industry and the economic realities of fostering true local competition so that all telecommunications markets can be opened to effective, sustained competition. Complying with the competitive checklist, ensuring that entry is consistent with the public interest, and meeting the other requirements of section 271 are realistic, necessary goals. That is not to say, however, that they are easy to meet or achievable overnight. Given the complexities of the task of opening these local markets to true, sustainable competition, it is not surprising that companies that are earnestly and in good faith cooperating in opening their local markets to competition have not yet completed the task. It is through such earnest, good faith efforts that BOCs will obtain authorization to provide in-region long distance service. Section 271 primarily places in each BOC's hands the power to determine if and when it will enter the long distance market. This is because it is the BOC's willingness to open its local telecommunications markets to competition pursuant to the requirements of the Act that will determine section 271 approval.

C. History of Ameritech's Efforts to Obtain In-Region, InterLATA Authorization for Michigan

24. Ameritech's efforts to obtain authority to provide in-region, interLATA services in Michigan began more than four years ago, when Ameritech announced its unique Customers First Plan in March 1993. In that plan, Ameritech proposed a framework for eliminating legal, economic, and technical barriers to entry to local exchange competition, in return for obtaining a waiver from the line of business restrictions in the MFJ in order to provide interLATA services, *inter alia*, in Grand Rapids, Michigan. Before judicial action was taken on Ameritech's proposal, however, the 1996 Act was enacted.

25. On January 2, 1997, Ameritech filed with the Commission its initial application to provide in-region, interLATA services in the state of Michigan, pursuant to section 271 (initial application).[36] Ameritech's initial application proved to be premature, however, because it relied on an interconnection agreement with AT&T Communications of Michigan that had not been approved by the Michigan Commission, as required by section 271, and that did not appear to be a legally binding contract.[37] As a result, Ameritech's initial application contained certain procedural irregularities that led in the first instance to the Commission

[36] 47 U.S.C. § 271. Ameritech's initial application was docketed by the Commission as CC Docket No. 97-1.

[37] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-1, Order, 12 FCC Rcd 3309, 3318 (1997) (*Ameritech February 7th Order*).

restarting the 90-day period of review for that application.[38] Then, on February 7, 1997, the Commission concluded that, for purposes of satisfying section 271, Ameritech could not rely on Ameritech's purported interconnection agreement with AT&T that was filed with its application.[39]

26. In reaching this conclusion, we noted that, "[b]ecause of the strict 90-day statutory review period, the section 271 review process is keenly dependent on both final approval of a binding agreement pursuant to section 252 as well as an applicant's submission of a complete application at the commencement of a section 271 proceeding."[40] We emphasized that an application's completeness was essential to permit state commissions and the Department of Justice to meet their respective statutory consultative obligations, as well as to allow interested parties to comment on, and the Commission to evaluate, an enormous and complex record in a short period of time.[41]

27. On February 11, 1997, Ameritech asked the Commission to dismiss its application without prejudice.[42] On February 12, 1997, the Common Carrier Bureau granted Ameritech's request, and terminated review of Ameritech's application without reaching the merits.[43]

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[38] Specifically, due to discrepancies between the AT&T Agreement filed with Ameritech's January 2nd application and a version of the agreement filed with the Michigan Commission on December 26, 1996, Ameritech filed an amendment to its initial application (amended application) on January 17, 1997, which relied on a new version of the AT&T Agreement that had been filed with the Michigan Commission on January 16. *Id.* at 3312-14. At Ameritech's request, the Commission restarted the 90-day review period, effectively treating the amended application as a newly filed application. *Id.* at 3310.

[39] *Id.* at 3318. On January 29, 1997, Ameritech filed with the Michigan Commission a new version of the AT&T agreement, which Ameritech claimed superseded all agreements previously filed with the Michigan Commission, and which was the first version of the agreement that had been executed by both parties. *Id.* at 3312-14. Ameritech did not, however, withdraw the January 16th version or request the Commission to consider the January 29th version for purposes of evaluating its Amended Application. *Id.* at 3314. On February 3, 1997, the Association for Local Telecommunications Services (ALTS) filed a motion to strike Ameritech's reliance on the AT&T Agreement for purposes of satisfying section 271. *Id.* at 3314.

[40] *Id.* at 3320-21.

[41] *Id.*

[42] Letter from John T. Lenahan, Assistant General Counsel, Ameritech, to William F. Caton, Acting Secretary, Federal Communications Commission (Feb. 11, 1997).

[43] *Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-1, Order, 12 FCC Rcd 2088 (Com. Car. Bur. rel. Feb. 12, 1997) (*Ameritech Termination Order*).

28. On May 21, 1997, Ameritech filed with the Commission an application to provide in-region, interLATA services in the state of Michigan.[44] Ameritech represents that its application satisfies the requirements of section 271(c)(1)(A), because it has entered into interconnection agreements with three carriers (Brooks Fiber, MFS WorldCom, and TCG) that have been approved by the Michigan Commission.[45] Ameritech also represents that it has "'fully implemented the competitive checklist in section 271(c)(2)(B)' . . . by providing each of the checklist items to its Section 271(c)(1)(A) competitors . . . at rates and on terms and conditions that comply with the Act."[46] In addition, Ameritech states that it has established a separate affiliate, Ameritech Communications, Inc. (ACI), to provide in-region, interLATA services in Michigan, and that it and ACI will abide by the structural and transactional requirements of section 272.[47] Finally, Ameritech argues that grant of its application is consistent with the public interest, because Ameritech's entry into the in-region, interLATA services market in Michigan will produce substantial benefits for consumers.[48] Accordingly, Ameritech requests the Commission to grant its application to provide in-region, interLATA services in the state of Michigan.[49]

29. As noted above, our review of the extensive record compiled in this proceeding indicates that Ameritech has made considerable progress toward satisfying the requirements of section 271. In this Order, we conclude that Ameritech is providing access and interconnection to an unaffiliated, facilities-based provider of telephone exchange service to residential and business subscribers in Michigan, as required by section 271(c)(1)(A). In addition, the record evidence shows that Ameritech has made substantial efforts to implement the competitive checklist. We conclude in this Order, however, that Ameritech has not yet demonstrated that it has fully implemented several items of the competitive checklist in

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[44] *See supra* note 4.

[45] Ameritech Application at 2-3. Ameritech further represents that these carriers are competing, unaffiliated providers of telephone exchange services that together serve residential and business customers in Michigan either exclusively or predominantly over their own facilities. *Id.* at 8.

[46] *Id.* at 15.

[47] *Id.* at 55-56.

[48] *Id.* at 3. Ameritech represents that "[t]he new competition that Ameritech will bring to the long distance industry will drive prices toward competitive levels, increase consumer choice, stimulate improved customer service and product innovation, and bring the benefits of advances in telecommunications services to a broader group of consumers." *Id.* at 67. Ameritech asserts that "Ameritech's entry into long distance in Michigan will create a $450-500 million annual benefit for Michigan consumers -- in present value terms, a consumer welfare benefit of more than $5.5 billion." *Id.* Ameritech does not specifically assert, however, that its retail prices for interLATA services will be lower than existing prices, nor does it make clear how any particular group of consumers will share in the foregoing, alleged consumer benefits.

[49] *Id.* at 4.

section 271(c)(2)(B) or that the requested authorization will be carried out in accordance with the requirements of section 272. We, therefore, must deny, pursuant to section 271(d)(3), Ameritech's application to provide in-region, interLATA services in Michigan. We, nevertheless, commend Ameritech for its efforts to date, and urge Ameritech to continue to work closely with new entrants, the Department of Justice, and the Michigan Commission to satisfy the requirements of section 271 for entry into the interLATA services market in Michigan.

III. CONSULTATION WITH THE MICHIGAN PUBLIC SERVICE COMMISSION AND THE UNITED STATES DEPARTMENT OF JUSTICE

A. State Verification of BOC Compliance with Section 271(c)

30. Under section 271(d)(2)(B), the Commission "shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c)."[50] In requiring the Commission to consult with the states, Congress afforded the states an opportunity to present their views regarding the opening of the BOCs' local networks to competition. In order to fulfill this role as effectively as possible, state commissions must conduct proceedings to develop a comprehensive factual record concerning BOC compliance with the requirements of section 271 and the status of local competition in advance of the filing of section 271 applications. We believe that the state commissions' knowledge of local conditions and experience in resolving factual disputes affords them a unique ability to develop a comprehensive, factual record regarding the opening of the BOCs' local networks to competition. The state commission's development of such a record in advance of a BOC's application is all the more important in light of the strict, 90-day deadline for Commission review of section 271 applications. Most state commissions, recognizing the importance of their role in the section 271 process, have initiated proceedings to develop a comprehensive

[50] 47 U.S.C. § 271(d)(2)(B). Subsection (c) states that a Bell operating company meets the requirements of paragraph (c)(1) if it has, for each state for which authorization is sought: (A) entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service to residential and business subscribers; or (B) a statement of the terms and conditions that the company generally offers to provide such access and interconnection, which has been approved or permitted to take effect effect by the State commission under section 252(f). *Id.* § 271(c)(1). Subsection (c) further states that a Bell operating company meets the requirements of paragraph (c)(2) if, within the state for which authorization is sought, the "[a]ccess or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of [the competitive checklist]." *Id.* § 271(c)(2).

record on these issues.[51] Others, however, have not yet initiated such proceedings, or have undertaken only a cursory review of BOC compliance with section 271. We note that the Act does not prescribe any standard for Commission consideration of a state commission's verification under section 271(d)(2)(B). The Commission, therefore, has discretion in each section 271 proceeding to determine what deference the Commission should accord to the state commission's verification in light of the nature and extent of state proceedings to develop a complete record concerning the applicant's compliance with section 271 and the status of local competition. We will consider carefully state determinations of fact that are supported by a detailed and extensive record, and believe the development of such a record to be of great importance to our review of section 271 applications. We emphasize, however, that it is our role to determine whether the factual record supports a conclusion that particular requirements of section 271 have been met.

31. On June 10, 1997, the Michigan Commission submitted its comments concerning Ameritech's application.[52] The Michigan Commission greatly assisted the Commission in this section 271 application by developing an extensive record and making factual findings based on that record concerning each of the requirements of section 271(c).

32. In its comments on Ameritech's initial January 1997 application, the Michigan Commission evaluated Ameritech's compliance with the requirements of section 271(c), and, based on available evidence at that time, found that Ameritech had entered into state-approved interconnection agreements that satisfied each of the elements of the competitive checklist.[53] After Ameritech withdrew its initial application, the Michigan Commission was able to develop a more complete record on Ameritech's compliance with the requirements of section 271(c). In its consultation on Ameritech's current application, the Michigan Commission updated its comments to account for new information contained in Ameritech's application and the record in Michigan Case No. U-11104 as of the date the Michigan Commission's

[51] *See State Regulators Call for Prompt InterLATA Reviews*, Telecommunications Reports, Feb. 17, 1997, at 7 (reporting that three state utility commissioners had urged other state utility commissioners to be prepared promptly to review BOC compliance with the requirements of section 271 so that the state utility commissions could fulfill the "crucial role assigned to [them]" by the 1996 Act, and comply with the Commission's schedule for reviewing section 271 applications) (citing Letter of Kenneth McClure, Missouri Public Service Commissioner; Cheryl L. Parrino, Chairman of the Wisconsin Public Service Commission; and Joan H. Smith, Oregon Public Utilities Commissioner, to various state public utilities commissioners (Jan. 24, 1997)).

[52] Comments of the Michigan Public Service Commission, CC Docket No. 97-137 (filed June 10, 1997) (Michigan Commission Consultation).

[53] Comments of the Michigan Public Service Commission, CC Docket No. 97-1 (filed Feb. 5, 1997) (February 5 Michigan Commission Comments).

consultation was filed, June 10, 1997.[54] Based on its continued review, the Michigan Commission concluded that Ameritech has not fully implemented four checklist items. In particular, the Michigan Commission found that Ameritech fails to provide nondiscriminatory access to its operations support systems, transport and switching, and access to its 911 and E911 services, as required by the competitive checklist.

33. The Michigan Commission provides a detailed, critical assessment of Ameritech's provision of access to its operations support systems, based on information produced in an informational hearing on Ameritech's operations support systems conducted on May 28, 1997.[55] In addition, the Michigan Commission recommends a comprehensive list of factors that should be considered in the development of performance standards for operations support systems.[56] The Michigan Commission's consultation also includes a detailed analysis of other checklist-related issues that arose after withdrawal of Ameritech's initial application, such as Ameritech's provision of access to 911 and E911 services.[57] The Michigan Commission also noted that some competing local exchange carriers have complained about higher blockage rates on trunks that interconnect such carriers' facilities to Ameritech's network.[58] The Michigan Commission's clear and incisive evaluation of these and other issues has been extremely helpful to our analysis of Ameritech's compliance with the competitive checklist.

34. We note, however, that the Michigan Commission's consultation did not include an analysis of the state of local competition in Michigan. This information is not germane to the competitive checklist, which is the one subject on which the Commission is required to consult with the state commissions. But this information will be valuable to our assessment of the public interest, and it is information which the state commissions are well-situated to gather and evaluate. Accordingly, in future applications, we suggest that the relevant state commission develop, and submit to the Commission, a record concerning the state of local competition as part of its consultation. In particular, state commissions should, if possible, submit information concerning the identity and number of competing providers of local exchange service, as well as the number, type, and geographic location of customers

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[54] Michigan Commission Consultation at 2. The Michigan Commission established Michigan Case No. U-11104 on June 5, 1996, to receive information relating to Ameritech's compliance with section 271(c).

[55] *Id.* at 13-34. The Michigan Commission decided to conduct this hearing because competing providers had gained considerable experience using Ameritech's operations support systems following the dismissal of Ameritech's original application. *Id.* at 14 (noting that, at the time of Ameritech's original application, little experience had been garnered with much of Ameritech's operations support systems).

[56] *Id.* at 31-32.

[57] *Id.* at 41-44.

[58] *Id.* at 12.

served by such competing providers. We recognize that carriers may view much of this information as proprietary and that different states have different procedures for obtaining and handling such information. Nevertheless, we encourage states to develop and submit to the Commission as much information as possible, consistent with state procedural requirements.

B. Department of Justice's Evaluation

35. Section 271(d)(2)(A) requires the Commission, before making any determination approving or denying a section 271 application, to consult with the Attorney General.[59] The Attorney General is entitled to evaluate the application "using any standard the Attorney General considers appropriate,"[60] and the Commission is required to "give substantial weight to the Attorney General's evaluation."[61] Section 271(d)(2)(A) specifically provides, however, that "such evaluation shall not have any preclusive effect on any Commission decision."[62]

36. Several of the BOCs maintain that the Department of Justice's evaluation in this proceeding is entitled to no special weight, because, they claim, the Commission is required to give substantial weight only to the Department of Justice's evaluation of the effect of BOC entry on long distance competition. These BOCs contend that the Department of Justice's evaluation of Ameritech's application impermissibly includes an assessment, among other things, of Ameritech's implementation of the competitive checklist.[63] SBC, for example, argues that "[i]t was only with respect to the effect of [BOC] entry on long distance competition that Congress provided a role for the Department of Justice."[64] SBC claims that the Joint Explanatory Statement indicates that, while the Department is free to choose a standard for evaluating a section 271 application, "the focus of its analysis should be the competitive effects of Bell company interLATA entry."[65] SBC concludes that the

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[59] 47 U.S.C. § 271(d)(2)(A).

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *See* SBC Reply Comments at 4; BellSouth Reply Comments at 1-2; *see also* Bell Atlantic/NYNEX Reply Comments at 8 (while section 271(d)(2)(A) "allows the Department of Justice [to evaluate the long distance authorization being sought] it cannot alter the substantive standard that governs the Commission's own determination," *e.g.*, by expanding the checklist).

[64] SBC Reply Comments at 2 (citing legislative history).

[65] *Id.* (citing Joint Explanatory Statement at 149, offering examples of antitrust standards that would be appropriate).

Department's discretion thus extends only to selecting an antitrust standard and evaluating the competitive effects of Bell company entry into the interLATA market under that standard.[66]

37. We find that the Commission is required to give substantial weight not only to the Department of Justice's evaluation of the effect of BOC entry on long distance competition, but also to its evaluation of each of the criteria for BOC entry under section 271(d)(3) if addressed by the Department of Justice. As noted above, section 271(d)(2) provides that, "[b]efore making any determination" under subsection (d) approving or denying a BOC application for authorization to provide in-region, interLATA services, "the Commission shall consult with the Attorney General, and . . . shall give substantial weight to the Attorney General's evaluation, but such evaluation shall not have any preclusive effect on any Commission decision."[67] Significantly, section 271(d)(2) does not limit the Attorney General's evaluation to any one of the conditions for BOC entry, to any particular portion of a BOC application, or to an appraisal of the competitive effects of BOC entry on the long distance market. Rather, that section states that the Attorney General is to provide an evaluation of the "application" using any standard the Attorney General considers appropriate. In addition, subsection (d)(2) does not limit the Commission's consultation with the Attorney General only to particular requirements for BOC entry, but rather provides that the Commission may not make "*any determination*" under subsection (d) before consulting with the Attorney General. We note that Congress limited the consultative role of state commissions to verification of BOC compliance with section 271(c), but imposed no such constraint on the Attorney General.[68] Therefore, the plain language of section 271(d) requires the Commission to accord substantial weight to the Department of Justice's entire evaluation, including its evaluation of each of the criteria for BOC entry under section 271(d)(3) if addressed by the Department of Justice, under whatever standard the Department of Justice considers appropriate.

38. Despite the plain language of section 271(d), several BOCs contend that the legislative history makes clear that the focus of the Department of Justice's analysis under section 271(d)(2) should be the competitive effects of BOC interLATA entry on long distance competition. In support of their interpretation of section 271(d)(2), these BOCs contend that Congress offered in the Joint Explanatory Statement specific examples of the type of antitrust standard and inquiry the Department of Justice could appropriately pursue, including: "(1) the standard included in the House amendment, whether there is a dangerous probability that the BOC or its affiliates would successfully use market power to substantially impede competition in the market such company seeks to enter; [or] (2) the standard contained in section VIII(C) of the AT&T Consent Decree, whether there is no substantial possibility that the BOC or its

[66] *Id.* at 3.

[67] 47 U.S.C. § 271(d)(2).

[68] *See id.* § 271(d)(2)(B).

affiliates could use monopoly power to impede competition in the market such company seeks to enter."[69] Additionally, these BOCs maintain that floor statements by several legislators confirm that the substantial weight to be accorded to the views of the Department of Justice is limited to its "expertise in antitrust matters."[70]

39. These BOCs fail, however, to quote completely the relevant Joint Explanatory Statement language. The quoted passage goes on specifically to state that, "[i]n making an evaluation, the Attorney General may use . . . (3) any other standard the Attorney General deems appropriate."[71] This passage does not limit such other standard to an antitrust standard. Thus, read in its entirety, the legislative history cited by these BOCs does not support their position that the Department of Justice's evaluation must be limited solely to the competitive effects of BOC entry on the interLATA market, or even to antitrust-related matters. It is a fundamental canon of statutory construction that the legislative history of a statute cannot undermine the plain meaning of a statute unless it clearly and unequivocally expresses a legislative intent contrary to that language.[72] Because we find the legislative history does not clearly and unequivocally manifest an intent by Congress to limit the Commission's reliance on the Attorney General's evaluation to the competitive effects of BOC interLATA entry on long distance competition, contrary to the plain language of section 271, we reject these BOCs' interpretation of section 271(d).[73]

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[69] *See* SBC Reply Comments at 2-3 (quoting Joint Explanatory Statement at 149); BellSouth Reply Comments at 3.

[70] SBC Reply Comments at 3 (citing 142 Cong. Rec. H1176 (daily ed. Feb. 1, 1996) (Statement of Rep. Jackson-Lee); 142 Cong. Rec. H1178 (daily ed. Feb. 1, 1996) (Statement of Rep. Sensenbrenner) ("FCC's reliance on the Justice Department is limited to antitrust related matters")); BellSouth Reply Comments at 3 (citing 142 Cong. Rec. H1176 (Statement of Rep. Jackson-Lee); 142 Cong. Rec. H1178 (Statement of Rep. Sensenbrenner); 142 Cong. Rec. H1157 (Statement of Rep. Hyde)).

[71] *See* Joint Explanatory Statement at 149.

[72] *Burlington No. R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) ("Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but '[i]n the absence of a "clearly expressed legislative intention to the contrary," the language of the statute itself "must ordinarily be regarded as conclusive."'") (citations omitted); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987).

[73] The remarks of individual members of Congress during floor debates, such as those relied on by these BOCs to support their contention that the Commission's reliance on the Department of Justice is narrowly circumscribed, are entitled to less weight than other types of legislative history. *See Allen v. Attorney General of State of Maine*, 80 F.3d 569, 575 (1st Cir. 1996) ("As a general matter, courts must be chary of overvaluing isolated comments by individual solons.") (citations omitted); *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 537 (7th Cir. 1991); *In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988) ("To the extent that legislative history may be considered, it is the official committee reports that provide the authoritative expression of legislative intent. . . . Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted for the bill.") (citations omitted). Thus, we generally do not rely on floor statements of individual members of Congress to ascertain the meaning of an

40. Even if we were to accept these BOCs' position, however, we would still be required to give substantial weight to the Attorney General's evaluation of, among other things, the state of local competition and the applicant's compliance with the competitive checklist.[74] Assessing the effects on long distance competition of BOC entry into the in-region, interLATA services market necessarily includes an analysis of whether the BOC retains the ability to leverage market power, if any, in the local exchange into the long distance market, because a BOC could use its control over bottleneck local exchange facilities to undermine competition in the long distance market. For example, a BOC could limit competition in the long distance market by providing its long distance competitors lower quality access services, by raising its competitors' costs in order to effect a price squeeze, or by improperly shifting costs from its long distance affiliate to the local exchange.[75] In addition, we note that each of the antitrust standards cited with approval by these BOCs focuses specifically on whether a BOC can use monopoly or market power *in the local exchange* to impede competition in the market the BOC seeks to enter (that is, the market for in-region, interLATA services).[76] Thus, a critical question in assessing the effects of BOC

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ambiguous statutory provision. In any event, in this case, we note that floor statements by other legislators support a conclusion contrary to that posited by these BOCs. *See, e.g.*, 142 Cong. Rec. S698 (daily ed. Feb. 1, 1996) (Statement of Sen. Kerrey) ("In conjunction with [its] evaluation, the Attorney General may submit any comments and supporting materials under any standard she believes appropriate. Through its work in investigating the telecommunications industry and enforcing the MFJ, DOJ has important knowledge, evidence, and experience that will be of critical importance in evaluating proposed long-distance entry -- which, as I indicated earlier, requires an FCC finding that such entry is in the public interest, and that a facilities-based competitor is present. On both of these issues, the DOJ's expertise in telecommunications and competitive issues generally should be of great value to the FCC.").

[74] In its evaluation of Ameritech's application, the Department of Justice submitted an analysis of the state of local competition in Michigan and provided a detailed analysis of Ameritech's compliance with four checklist items. Department of Justice Evaluation at 7-27. The Department of Justice did not evaluate Ameritech's compliance with the remaining checklist items.

[75] We recently observed that a BOC may have an incentive to allocate costs from its competitive interLATA services to regulated services so long as the BOC is subject to price cap rules that retain elements of cost of service regulation (*e.g.*, if the BOC can select an option that requires it to share earnings that exceed specified benchmarks with its customers, or that permits it to make a low-end adjustment if earnings fall below a specified threshold). *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149, 96-61, Second Report and Order in CC Docket No. 96-149, and Third Report and Order in CC Docket No. 96-61, FCC 97-142, at paras. 103-08 (rel. Apr. 18, 1997) (*LEC Classification Order*).

[76] *See, e.g.*, SBC Reply Comments at 2-3 ("The Conference Report even offers specific examples of antitrust standards that would be appropriate, 'including: (1) . . . whether there is a dangerous probability that the BOC or its affiliates would successfully use *market power* to substantially impede competition in the market such company seeks to enter; [or] (2) . . . whether there is no substantial possibility that the BOC or its affiliates could use *monopoly power* to impede competition in the market such company seeks to enter.'") (emphasis added) (quoting Joint Explanatory Statement at 149).

entry on long distance competition is whether the local exchange is open to competition. As a practical matter, that analysis would require the Attorney General to evaluate whether the BOC has complied with the competitive checklist and other requirements of sections 271 and 272, and whether such compliance has, in fact, sufficiently reduced the BOC's bottleneck control of the local exchange. Thus, in order to give substantial weight to the Attorney General's evaluation of "the effect of Bell company entry on long distance competition," as advocated by these BOCs,[77] we must accord substantial weight to the Attorney General's assessment of BOC compliance with the competitive checklist and other requirements of sections 271 and 272, as well as the impact of such compliance on the state of competition in the local exchange.

41. In its evaluation of Ameritech's current application, the Department of Justice focused on certain deficiencies in Ameritech's application. The Department of Justice concluded that, although Ameritech has made significant progress toward satisfying the requirements of section 271, Ameritech has failed in several respects. First, the Department of Justice concluded that Ameritech has not fully implemented several elements of the competitive checklist, including the requirements that it provide unbundled local switching, unbundled transport, interconnection equal in quality to that provided to itself, and access to operations support systems.[78] The Department of Justice's detailed and thoughtful evaluation on these issues has been very helpful to our analysis.[79]

42. Second, the Department of Justice concluded that granting Ameritech's application would not be consistent with the public interest, because local markets in Michigan are not irreversibly open to competition. Specifically, the Department of Justice found that, although limited competitive entry is occurring in Michigan under all entry paths contemplated by the 1996 Act (construction of networks and interconnection with incumbent LECs, use of unbundled elements, and resale), there is not yet sufficient local competition to presume the market is open to competition.[80] The Department of Justice, therefore, examined whether barriers to entry in Michigan exist that would impede the growth of local competition, and concluded that such barriers remain.[81] In addition, the Department of Justice concluded that the absence of adequate performance measures and enforceable benchmarks

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[77] *See* SBC Reply Comments at 2; *see also* BellSouth Reply Comments at 3 ("The DOJ's role under Section 271(d)(2)(A) is limited to analyzing the competitive impact BOC entry will have on the in-region, interLATA market.").

[78] Department of Justice Evaluation at 7-27.

[79] In future applications, we encourage the Department of Justice to examine the applicant's compliance with each checklist item, as the Michigan Commission did in this case.

[80] Department of Justice Evaluation at 31.

[81] *Id.*

suggests that local competition in Michigan is not yet irreversible.[82] Although we do not reach the question of whether the authorization requested by Ameritech is consistent with the public interest, convenience, and necessity, the Department of Justice's examination of the state of local competition in Michigan is the type of analysis that we will find useful in its evaluations of future applications. We also would find it useful in such evaluations for the Department of Justice to assess the impact of BOC entry on long distance competition, and, in particular, to analyze the expected consumer welfare benefits resulting from additional long distance competition.

IV. STANDARD FOR EVALUATING SECTION 271 APPLICATIONS

A. Burden of Proof for Section 271 Applications

43. Section 271 places on the applicant the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied. Section 271(d)(3) provides that "[t]he Commission shall not approve the authorization requested in an application . . . *unless* it finds that [the petitioning BOC has satisfied all the requirements of section 271]."[83] Because Congress required the Commission affirmatively to find that a BOC application has satisfied the statutory criteria, the ultimate burden of proof with respect to factual issues remains at all times with the BOC, even if no party opposes the BOC's application.[84]

44. In the first instance, therefore, a BOC must present a *prima facie* case in its application that all of the requirements of section 271 have been satisfied.[85] Once the applicant has made such a showing, opponents of the BOC's entry must, as a practical matter,

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[82] *Id.*

[83] 47 U.S.C. § 271(d)(3) (emphasis added).

[84] *See Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order, FCC 97-228, para. 13 (rel. June 26, 1997) (*SBC Oklahoma Order*). In the Commission's *Non-Accounting Safeguards Order*, the Commission noted that the term "burden of proof" has been used to describe two separate but related concepts. First, it has been used to describe the burden of persuasion with respect to a particular issue, which never shifts from one party to the other. Second, it has been used to describe the burden of production, which requires a party to go forward with sufficient evidence to avoid an adverse ruling on an issue -- this burden may shift back and forth between the parties. *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22072 (citing Black's Law Dictionary 136 (Abridged 6th ed. 1991)). In this context, we use the term "burden of proof" to refer to the "burden of persuasion."

[85] Thus, a BOC must plead, with appropriate supporting evidence, facts which, if true, are sufficient to establish that the requirements of section 271 have been met. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 22070.